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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. GUSTAVO RIOS III, Defendant and Appellant.	2d Crim. No. B279787 (Super. Ct. No. 2012024096) (Ventura County)

An information charged appellant Gustavo Rios III with murder (Pen. Code, § 187, subd. (a))[1] and alleged that he personally used a deadly and dangerous weapon in committing the offense (§ 12022, subd. (b)(1)). A jury found appellant guilty of first degree murder, and it also found the weapon allegation to be true. The trial court sentenced appellant to a prison term of 25 years to life, plus one consecutive year for the weapon enhancement. It also imposed a $30 criminal conviction

[1] All further statutory references are to the Penal Code unless otherwise specified.

assessment fee (Gov. Code, § 70373) and a $40 court security fee assessment (§ 1465.8) (collectively "assessments"), plus a $10,000 restitution fine (§ 1202.4, subd. (b)).

It is undisputed that appellant killed his maternal grandmother, Isabel Hernandez.[2] Appellant contends, however, that substantial evidence does not support the jury's finding that the offense was deliberate, willful and premeditated. He also asserts that the trial court erred by failing to instruct the jury on the lesser included offense of involuntary manslaughter and by improperly modifying CALCRIM No. 3428 on mental impairment. In addition to raising claims of ineffective assistance of trial counsel, appellant argues, based upon *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*), that imposition of the assessments and the $10,000 restitution fine violated his federal and state constitutional rights to due process and equal protection because the trial court failed to find that appellant had the ability to pay those costs.

The Attorney General concedes, and we agree, the abstract of judgment must be amended to accurately reflect the sentence imposed by the trial court. In all other respects, we affirm.

FACTS

A. Prosecution's Evidence

Isabel was the matriarch of a large, close-knit family. She had four daughters: Bertha Maggio, Yolanda Rodriguez, Cynthia Romo and Debra Rios. Appellant is Debra's son.

Debra is a drug addict. Appellant's father, Gustavo Rios, Jr. (Gustavo), had a history of substance abuse, as did appellant.

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[2] Many of appellant's family members share the same last name. To avoid confusion, we refer to them by their first names. No disrespect is intended.

Family members, including Isabel, were aware of appellant's drug addiction and tried to get him help.

In 2009, Isabel rented a house in Moorpark for herself, Debra, and Debra's children, including appellant. Appellant and Debra frequently argued about drugs, and appellant was aggressive with her many times. Isabel, who never used drugs, was worried about Debra and appellant. Ultimately, Isabel decided to move out.

In February 2012,[3] Isabel moved into a senior housing complex in Simi Valley. Isabel allowed appellant to stay with her two or three nights a week.

On June 23, appellant threw a bottle into the front window of a pawn shop. When police arrived, they noted that appellant appeared to be under the influence of a stimulant. Appellant was arrested for felony vandalism. Isabel, who was upset, told appellant he needed to attend a drug recovery program.

Between April 30 and June 29, Isabel withdrew $1,100.60 from her bank account. On the evening of June 30, Isabel and appellant ran a few errands. At 7:02 p.m., Isabel withdrew $80 from her bank account. She then purchased a $391 money order with cash at an Albertson's grocery store. Video surveillance showed Isabel putting money into her wallet. Appellant stayed in Isabel's car while she was in the store.

At 8 p.m., Isabel spoke on the phone with Yolanda. She told Yolanda that she was at home with appellant. At 8:53 p.m., Isabel spoke with Bertha. Once again, Isabel said she was at home with appellant. Isabel told Bertha that appellant was going to stay with his father that night.

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[3] All further date references are to the year 2012 unless otherwise stated.

The next morning, on July 1, at about 8:30 a.m., appellant arrived at the Simi Valley home of his aunt, Velma Agradas. His father Gustavo was staying with Velma. Appellant, who seemed nervous, asked his father if he could take a shower there. Appellant was sweaty, and his clothes and shoes were stained. After appellant took a shower, Gustavo gave him clean clothes. Appellant put his dirty clothes in a bag. Appellant later asked Gustavo if there was a place in Mexico where he could hide.

Isabel did not attend church that morning, which was very unusual. After 10 a.m., Bertha, Yolanda and Cynthia each called their mother, but she did not answer. Bertha asked her son Robert Diaz to check on Isabel. Robert went to Isabel's apartment and found her car in her parking spot. The front door was locked. When Isabel did not respond to his knocks, Robert called 911.

Officer Tristin Sturz of the Simi Valley Police Department and other officers responded. They forced entry into the apartment and found Isabel dead, lying face down in the kitchen. There was a laceration across her throat. Officers found blood on the floor and on the back of Isabel's neck, and her hair was matted. There were signs of a struggle in the bedroom, as several items were knocked over, the bed was moved from the headboard, and there was blood on the bed. Along with the blood, there were ink marks dotting the sheets. A sharp object had cut through a sheet. A bloodstain from an object with a linear edge had been wiped on the sheet. A bloody kitchen knife was found in the kitchen trash can. There were drops of blood from the bedroom to the kitchen, as well as bloody smudges on the front door.

Appellant and Debra subsequently joined other family members at the apartment. Appellant told Detective Keith

Eisenhour that he left Isabel's apartment the previous evening and went to his father's house. After speaking with Gustavo, Detective Eisenhour determined that appellant's alibi was false. Appellant agreed to go to the police station to answer more questions.[4]

At the station, appellant told Officer Sturz and Detective Eisenhour that he spent a lot of time with Isabel, with whom he was very close. He said that on Saturday, June 30, he and Isabel went to Debra's house and then returned to Isabel's apartment. While he watched television, a man knocked on the door and spoke with Isabel. Appellant did not hear that discussion. Isabel then went to lie down. Around 7 or 8 p.m., appellant went to the home of his aunt and father and slept outside in his uncle's truck. The next morning, appellant hung out with his father. Later, Debra called and said something had happened to Isabel. Appellant then went to Isabel's apartment. He said he did not know who killed Isabel.

Appellant admitted he was trying to understand how this "accident" happened. He said it was like a "rage blackout" due to stress and that it was like a dream. He said, "I don't know how I let my rage control me," and then stated, "I just felt like she was plotting against me to kill me."

During a break, appellant told Detective Eisenhour that he did not "remember shit" about what occurred, that he was losing his memory and that he was "fuckin' crazy." After returning to the interview room, appellant told Detective Eisenhour that he was not supposed to kill Isabel but that it happened so fast. He said he did not recall how he killed Isabel. When the detective

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[4] Appellant's interviews at the police station were recorded and played for the jury.

showed appellant a photograph of Isabel lying dead on the floor, appellant responded, "My demons were telling me to." He said Isabel was losing her memory and "deserved to go to her next life." Appellant admitted going into her bedroom, while she was asleep, and stabbing her with a kitchen knife, a butter knife and a pen. He used the pen to stab her neck. He claimed that Isabel told him he was supposed to kill her.

Appellant did not recall how many times he stabbed Isabel, but said it was "too many" times. He wanted her to go quietly, but things happened differently. He said he dragged Isabel to the kitchen while she was still alive and that she fought back "[a] little bit." After appellant was placed under arrest, he stated that he had a demon inside him "[f]orever." He said, "I'm really not that crazy. I didn't mean to kill my grandma in cold blood."

Appellant told police that he burned his clothes in a trash can and threw away the ashes because the demons told him to do it. He then withdrew his confession and said he did not kill Isabel and had lied about everything. He said he needed to go to a mental hospital, but later said, "I know she wasn't supposed to go out like that, but that's just what happened I guess. I'm fuckin' looney in the head."

After Detective Eisenhour left the room, appellant initiated a conversation with Detective Dan Swanson. Appellant said he was "crazy in the head." He admitted he loved Isabel, but said she was losing her memory and deserved to go to her next life. Appellant agreed to write an apology letter to Isabel, and he wrote two such letters.

Appellant said he did not want to kill Isabel and did not know why he did it. Detective Swanson asked appellant what happened to the two knives and pen. Appellant responded that

he might have dropped them as he ran. He said he did not get high that day.

Dr. Kimberly Loda saw appellant on July 2. Appellant told Dr. Loda that he felt sad but had no thoughts of suicide. He admitted using drugs in the past, but said, "I don't think drugs are a part of this." Appellant did not mention any auditory hallucinations or delusions and showed no signs of psychosis.

On July 3, Dr. Loda again noted no signs of delusions, hallucinations or suicidal ideation. Two days later, appellant told her that he wanted to strangle himself. He then said, "I guess I'll have to go back to the medical floor, huh?" Appellant banged his head and swore at the deputies. Dr. Loda believed appellant was trying to manipulate her and was malingering. She found no overt signs of psychosis.

Forensic scientist Kristin Rogahn, a blood-pattern expert, reviewed crime scene photographs and autopsy reports. The blood spatter pattern in the kitchen was consistent with Isabel having been stabbed in the chest and then turned over for the throat cut. There were four separate blood saturation stains on the bedding in the bedroom, indicating further bloodshed activity in that location.

While she was still alive, Isabel received approximately 20 stab wounds to her chest, hands, and right ear with at least two instruments. Some wounds were consistent with being stabbed with a ballpoint pen. Isabel's throat was cut with a knife, and the wound was consistent with her being in a prone position with appellant behind her, pulling the knife across the front of her neck from left to right. There were seven sharp force injuries to her shoulders, and five stab wounds to her chest, some of which were fatal. Isabel's hands had several cuts, indicating that she

fought her attacker. Finally, Isabel suffered bruising and blunt force trauma to her chest and three rib fractures. The force required to break a rib was consistent with a kick or stomp.

Isabel also suffered petechial hemorrhages in her eyes, bruising to the front of her neck, and damage to her hyoid bone, indicating that she was strangled by hand. Because the stab wounds were fatal wounds, the strangulation likely occurred before she died. Based on the amount of blood on the floor, Isabel was likely stabbed to death in the kitchen, while on her back, and then turned over before her throat was cut.

Annette Barrera, Isabel's granddaughter, helped clean Isabel's apartment. She found notes made by Isabel documenting money owed to her by appellant and Debra. Isabel's handbag contained a bank receipt for an $80 withdrawal made on June 30. Yolanda later found $16 in Isabel's checkbook, but no money in her handbag.

B. Defense Evidence

Appellant did not testify. His mother, Debra, testified that she used pain pills up until about the time her mother was killed and that she was a regular methamphetamine user. While they lived together, appellant sometimes took Debra's pills, and they argued about it. She was also aware that appellant used methamphetamine, heroin, OxyContin, methadone and marijuana. Debra believed appellant was not using drugs at the time Isabel was killed.

In the weeks before Isabel's killing, Debra noticed changes in appellant's behavior. Appellant became anti-social, cried often and stared at nothing. He stopped caring about how he dressed and let his facial hair grow. Appellant held the Bible and talked about "weird" things. He told Debra that he was hearing voices.

Appellant's Aunt Cynthia also noticed that appellant had distanced himself from the family.

Forensic scientist Debra Mittelbrun analyzed appellant's urine and blood samples collected on July 1 and July 2. There was an inconclusive result for marijuana and a negative result for other substances. Appellant admitted, however, to using heroin and methamphetamine seven days before the killing.

Dr. Randy Wood, a psychologist, evaluated appellant to assess whether he had a mental disease at the time of the killing. On January 2, 2015, Dr. Wood wrote a report in which he concluded that the circumstances of the crime did not qualify for a legal defense of not guilty by reason of insanity.

On November 3, 2015, Dr. Wood again interviewed appellant. He opined that appellant was experiencing a mental disease on July 1, and that symptoms had begun to manifest before that date. Dr. Wood believed there was no indication that the symptoms were part of a malingering scheme. Dr. Wood concluded that appellant suffered from schizophrenia, with a paranoid subtype. He noted that auditory hallucinations often go along with delusional thinking, which can affect volitional control.

Dr. Wood opined that appellant's odd behavior during the three months before he killed Isabel was consistent with this diagnosis. In his police interviews, however, appellant offered several explanations for why he had to kill Isabel, including that a voice told him to do it and that she wanted him to kill her. Dr. Wood acknowledged that appellant's repeated lies could be signs of malingering.

C. Prosecution's Rebuttal Evidence

Dr. Kris Mohandie, a clinical psychologist, conducted a forensic evaluation of appellant. He explained that a defendant's self-report of psychological symptoms is suspect because there is an incentive to exaggerate or lie. Dr. Mohandie visited the murder site, met with appellant three times, and reviewed reports and video evidence. He found that appellant had no documented mental health history before the killing and no sign of psychosis during his vandalism arrest. Appellant's behavioral changes coincided with his known drug use.

Appellant presented eight different stories during his police interviews. He showed an organized thought process that was inconsistent with a psychotic impairment diagnosis. Accordingly, Dr. Mohandie ruled out schizophrenia and other psychotic conditions.

Dr. Mohandie diagnosed appellant with a mixed personality disorder that included aspects of antisocial personality, borderline personality, and dependent personality. These disorders lead to self-destructive behavior, impulsiveness and uncontrolled anger. There are no gross hallucinations or delusions associated with these personality disorders. Tests given to appellant also revealed that he was malingering by showing exaggerated symptom reporting.

In addition, Dr. Mohandie diagnosed appellant with a chemical dependency. Appellant's dependency issues included opioids, methamphetamine and sedatives. Symptoms of withdrawal from heroin can include hallucinations and other kinds of psychotic-like experiences. A drug addict can be emotionally unstable and may be triggered into a rage by anything. There was no evidence, however, that appellant was

responding to command hallucinations when he killed Isabel. Appellant's disposal of evidence also showed he was aware he did something wrong.

DISCUSSION

A. Substantial Evidence Supports Appellant's First Degree Murder Conviction

Appellant claims he was denied due process of law because the evidence of premeditation, deliberation and willfulness was insufficient to support his conviction for first degree murder. We are not persuaded.

1. Standard of Review

When considering a claim of insufficient evidence, we review "'"the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence – that is, evidence which is reasonable, credible, and of solid value – such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt."'" (*People v. Streeter* (2012) 54 Cal.4th 205, 241.) We "'must accept logical inferences that the jury might have drawn from the evidence even if [we] would have concluded otherwise.'" (*Ibid.*) We do not reweigh the evidence or reevaluate the credibility of witnesses. (*People v. Jones* (1990) 51 Cal.3d 294, 314.)

2. Applicable Law

To convict appellant of first degree murder, the jury was required to find that his killing of Isabel was "willful, deliberate, and premeditated." (§ 189, subd. (a).) "A verdict of deliberate and premeditated first degree murder requires more than a showing of intent to kill." (*People v. Solomon* (2010) 49 Cal.4th 792, 812.) '"'Deliberation" refers to careful weighing of considerations in forming a course of action; "premeditation"

means thought over in advance.'" (*Ibid.*) '"'Premeditation and deliberation can occur in a brief interval. 'The test is not time, but reflection. "Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly."'" [Citation.]'" (*Ibid.*) '"The true test is not the duration of time as much as it is the extent of the reflection."' (*Id.* at p. 813.)

Our Supreme Court has identified three types of evidence commonly shown in cases of premeditated murder: (1) planning, (2) motive, and (3) manner of killing. (*People v. Anderson* (1968) 70 Cal.2d 15, 26-27 (*Anderson*).) Generally, a verdict of premeditation and deliberation will be upheld when there is evidence of all three *Anderson* factors. (*Id.* at p. 27.) Alternatively, a verdict will be sustained when "there is extremely strong evidence of planning; or evidence of motive in conjunction with either (a) evidence of planning or (b) evidence of a manner of killing showing a preconceived design." (*People v. Brito* (1991) 232 Cal.App.3d 316, 323.)

But *Anderson* "did not change the definition of murder or establish elements that had to be proven in each case; it established 'guidelines to aid reviewing courts in analyzing the sufficiency of the evidence to sustain findings of premeditation and deliberation.' [Citation.] 'The *Anderson* factors, while helpful for purposes of review, are not a sine qua non to finding first degree premeditated murder, nor are they exclusive.' [Citations.] [In other words,] the factors do not impose 'a straightjacket on the manner in which premeditation can be proven adequately at trial.' [Citation.]" (*People v. Williams* (2018) 23 Cal.App.5th 396, 409-410.)

3. Analysis

Evidence of all three *Anderson* factors was presented here. First, with respect to motive, the jury could reasonably have inferred that appellant sought to kill Isabel because of the beliefs he held about her. After the killing, appellant told police officers on two occasions that Isabel was losing her memory and "deserved to go to her next life." Although this motive is irrational, "the law does not require that a first degree murderer have a 'rational' motive for killing. . . . [A]ny motive, 'shallow and distorted but, to the perpetrator, genuine' may be sufficient." (*People v. Lunafelix* (1985) 168 Cal.App.3d 97, 102 (*Lunafelix*); see *People v. Edwards* (1991) 54 Cal.3d 787, 814 ["A senseless, random, but premeditated, killing supports a verdict of first degree murder"]; *People v. Pensinger* (1991) 52 Cal.3d 1210, 1238 [the fact of an unreasonable motivation "is true of any senseless killing, but the incomprehensibility of the motive does not mean that the jury could not reasonably infer that the defendant entertained and acted on it"].)

Another reasonable inference is that appellant had a monetary motive for killing Isabel. The prosecution introduced evidence that appellant, who owed a substantial fine in connection with his felony vandalism conviction, had been borrowing money from Isabel. Appellant also had a history of stealing to buy drugs. On the night Isabel was killed, she had withdrawn $80 from her bank account and had purchased a money order with some of the cash. She placed the remaining cash in her wallet. After her killing, family members found no cash in her handbag.

Second, the prosecution introduced evidence that appellant had planned to kill Isabel. "Planning activity" refers to "facts

about how and what defendant did prior to the actual killing which show that the defendant was engaged in activity directed toward, and explicable as intended to result in, the killing . . . ." (*Anderson*, *supra*, 70 Cal.2d at p. 26, italics omitted; see *People v. Sanchez* (1995) 12 Cal.4th 1, 34 (*Sanchez*) [retrieving knife from kitchen is evidence of planning], overruled on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; *People v. Perez* (1992) 2 Cal.4th 1117, 1126, 1129 (*Perez*) [same]; *People v. Wharton* (1991) 53 Cal.3d 522, 547 [retrieving a hammer to kill the victim constitutes planning activity].)

Appellant admitted that Isabel was asleep when he entered her bedroom and began stabbing her with a kitchen knife, a butter knife and a pen. He necessarily engaged in "planning activity" by retrieving those items from elsewhere in the apartment before entering Isabel's bedroom. A reasonable jury could infer from this evidence that appellant planned to stab and kill Isabel. (See *Sanchez*, *supra*, 12 Cal.4th at p. 34; *Perez*, *supra*, 2 Cal.4th at pp. 1126, 1129.)

Finally, the manner of killing supports appellant's first degree murder conviction. As the People point out, appellant had ample time to deliberate and premeditate before attacking Isabel while she was sleeping in her bed, and then before fatally stabbing her in the kitchen. While in the bedroom, appellant stabbed Isabel repeatedly with at least one knife and a pen, causing her to bleed profusely. Following a struggle, appellant dragged Isabel to kitchen, where he manually strangled her and stabbed her five times to the chest, fracturing three ribs. Appellant then turned Isabel over and slit her throat with a knife. Appellant's manner of killing, along with the evidence of motive and planning, were sufficient to support a finding of

premeditation, deliberation and willfulness. (See *People v. Shamblin* (2015) 236 Cal.App.4th 1, 11-12 [length of time it took to strangle victim indicated defendant had ample time to consider the consequences of his actions].) Moreover, "[t]he utter lack of provocation by the [sleeping] victim is a strong factor supporting the conclusion that appellant's attack was deliberately and reflectively conceived in advance." (*Lunafelix*, *supra*, 168 Cal.App.3d at p. 102.)

B. *Any Error in Failing to Instruct the Jury on Involuntary Manslaughter was Harmless*

Appellant argues the trial court had a duty to sua sponte instruct the jury on the lesser included offense of involuntary manslaughter in relation to the murder charge. "Involuntary manslaughter is 'the unlawful killing of a human being without malice aforethought and without an intent to kill.' [Citation.] A verdict of involuntary manslaughter is warranted where the defendant demonstrates 'that because of his mental illness . . . he did not in fact form the intent unlawfully to kill (i.e., did not have malice aforethought).' [Citation.] An instruction on involuntary manslaughter is required whenever there is substantial evidence indicating the defendant did not actually form the intent to kill. [Citations.]" (*People v. Rogers* (2006) 39 Cal.4th 826, 884 (*Rogers*), italics omitted.)

The People contend the trial court did not have a sua sponte duty to instruct on involuntary manslaughter because substantial evidence did not support such an instruction. We need not reach this contention, however, because even if we assume an error did occur, it was harmless.

"In addition to being fully instructed on first degree premeditated murder, the jury also was instructed on the lesser

included offense[] of implied malice second degree murder," which requires a higher degree of culpability than the offense of involuntary manslaughter. (*Rogers*, *supra*, 39 Cal.4th at p. 884.) "The jury rejected the lesser option[] and found defendant guilty of first degree premeditated murder. Under the circumstances, there is no reasonable probability that, had the jury been instructed on involuntary manslaughter, it would have chosen that option." (*Ibid.* [failure to instruct on involuntary manslaughter was harmless where jury received instructions on second degree murder and voluntary manslaughter and convicted defendant of first degree murder]; *People v. Elliot* (2005) 37 Cal.4th 453, 476 [failure to instruct on second degree murder was harmless where special circumstances finding resulted in conviction of first degree felony murder]; *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1145 ["the fact that the jury rejected manslaughter and found defendant guilty of the first degree murder of [the victim] precludes any possible error in the refusal to instruct on involuntary manslaughter"]; *People v. Earp* (1999) 20 Cal.4th 826, 885-886 [refusal to instruct on implied malice theory of second degree murder and involuntary manslaughter was harmless in view of jury's special circumstances findings].)

C. Any Error in Instructing the Jury With a Modified Version of CALCRIM No. 3428 was Harmless

The trial court declined appellant's request to instruct the jury on voluntary manslaughter under an imperfect self-defense theory. Instead, it instructed the jury with a modified version of CALCRIM No. 3428 (Mental Impairment: Defense to Specific Intent or Mental State), as follows: "You have heard evidence that the defendant may have suffered from a mental disease or disorder. You may consider this evidence only for the limited

purpose of deciding whether, at the time of the charged crime, the defendant acted with the intent or mental state required for that crime, specifically that he acted willfully, deliberately, and with premeditation. [¶] The People have the burden of proving beyond a reasonable doubt that the defendant acted with the required intent or mental state. If the People have not met this burden, you must find the defendant not guilty of first degree murder."

Consistent with this instruction, the defense argued, based on a theory of diminished actuality, that appellant was not guilty of first degree murder. Specifically, appellant asserted that his delusional symptoms and hallucinations prevented him from deliberating and premeditating -- two elements the prosecution had to prove to obtain a conviction for first degree murder. Instead, the defense sought a verdict of second degree murder.

Appellant contends the modified version of CALCRIM No. 3428 left the jury with an incomplete instruction on mental impairment. Specifically, the jury was not allowed to consider appellant's mental disorder for the purpose of determining whether he acted with malice aforethought at the time of the killing. As a result, the jury was prohibited from considering evidence of appellant's mental disease as a defense to the charge of second degree murder.

The People respond that this argument was forfeited because appellant's counsel did not object to the modified instruction. Generally, a defendant's failure to object to a jury instruction forfeits a claim of error on appeal. (*People v. Virgil* (2011) 51 Cal.4th 1210, 1260.) We conclude, however, that it is irrelevant whether the argument was forfeited because any error in failing to give the complete instruction was harmless.

It is undisputed the jury was properly instructed on the elements of first and second degree murder. By finding appellant guilty of first degree murder, the jury necessarily found that his actions in killing Isabel were deliberate, willful and premeditated. The jury rejected the defense theory that diminished actuality, i.e., "the actual lack of a requisite mental state, due to an abnormal mental condition," negated this specific intent (as discussed in CALCRIM No. 3428.) (*People v. Wright* (2005) 35 Cal.4th 964, 978.)

Under these circumstances, there is no reasonable probability that the jurors would have found that appellant's mental disease affected his ability to form the required intent for second degree murder when they specifically found that any such mental impairment did not affect his ability to form the required intent for first degree murder. In other words, the jury's decision to convict appellant of first degree murder eliminated any need for it to consider potential defenses to the second degree murder charge. Accordingly, it is not reasonably probable that giving a more expansive version of CALCRIM No. 3428 would have led to a more favorable outcome.

D. Appellant Has Not Established Ineffective Assistance of Counsel

Appellant argues that he was denied his right to effective assistance counsel by his counsel's failure to request an involuntary manslaughter instruction and to request the inclusion of malice aforethought in CALCRIM No. 3428.

"The Sixth Amendment guarantees competent representation by counsel for criminal defendants. . . . A meritorious claim of constitutionally ineffective assistance must establish both: '(1) that counsel's representation fell below an

objective standard of reasonableness; and (2) that there is a reasonable probability that, but for counsel's unprofessional errors, a determination more favorable to defendant would have resulted. [Citations.] If the defendant makes an insufficient showing on either one of these components, the ineffective assistance claim fails. Moreover, "'a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies.' [Citation.]'" [Citation.]" (*People v. Holt* (1997) 15 Cal.4th 619, 703, italics omitted; *People v. Bonilla* (2018) 29 Cal.App.5th 649, 654.)

We have already concluded that any error in failing to instruct the jury on the lesser included offense of involuntary manslaughter was harmless. We have further determined that any failure to include an instruction on malice aforethought in CALCRIM No. 3428 was harmless. Thus, our determination that the asserted errors were harmless precludes the finding of prejudice necessary for a claim of ineffective assistance of counsel. (*People v. Cleveland* (2004) 32 Cal.4th 704, 746; *People v. Maury* (2003) 30 Cal.4th 342, 394.)

E. The Trial Court Did Not Err by Imposing the Assessments and Restitution Fine

Following oral argument in this appeal, appellant submitted a supplemental brief in which he claimed the trial court erred in imposing the $70 in assessments and the $10,000 restitution fine without first determining his ability to pay those costs. Relying upon *Dueñas*, appellant argues this was a violation of his due process and equal protection rights.

Dueñas held that trial courts may not impose three of the standard criminal assessments and fines – namely, the $30 court

operations assessment (Gov. Code, § 70373), the $40 criminal conviction assessment (§ 1465.8) and a $300 restitution fine (§ 1202.4) -- without first ascertaining the "defendant's present ability to pay." (*Dueñas*, *supra*, 30 Cal.App.5th at pp. 1164, 1172, fn. 10.) We need not decide whether we agree with *Dueñas* because appellant is not entitled to a remand even if we accept its holding. That is because the record in this case, unlike the record in *Dueñas*, indicates that appellant had the ability to pay the $70 in assessments, and that he forfeited his right to challenge the $10,000 restitution fine.

At the sentencing hearing, appellant did not object to the imposition of the assessments and restitution fine. His counsel did state that appellant was "essentially transient" and requested that the public defender's office fee and the $1,978 presentence investigation fee be reduced to $300 each. The trial court found that appellant did not have the ability to pay the $1,978 presentence investigation fee, but ordered him to pay $1,000 in public defender fees.

Section 987.8, subdivision (b) allows the trial court to "make a determination of the present ability of the defendant to pay all or a portion of the cost" of representation by a public defender. Section 987.8, subdivision (g)(2)(B) states the court shall not "consider a period of more than six months from the date of the hearing for purposes of determining the defendant's reasonably discernible future financial position." Absent "unusual circumstances," the court must find that the defendant does "not . . . have a reasonably discernible future financial ability to reimburse the costs of his or her defense" if he or she was sentenced to state prison. (*Ibid.*)

Appellant does not appeal the imposition of the $1,000 in public defender fees. We must presume, therefore, that the order is correct and that the trial court found unusual circumstances justifying the fees. (*People v. Giordano* (2007) 42 Cal.4th 644, 666.) We also must presume that the court found, based upon appellant's "reasonably discernible future financial position," that he had the ability to pay the fees within six months. (§ 987.8, subd. (g)(2)(B).)

At the time the trial court made this finding, it was aware that the $70 in assessments would be imposed. Notwithstanding that knowledge, the court found that appellant had the ability to pay an additional $1,000 in public defender fees within a reasonable period of time. Implicit in the court's finding is the determination that appellant also had the ability to pay the assessments. Presumably, the court would have reduced the fee award if it believed appellant could not pay both the fees and the assessments.

With respect to the $10,000 restitution fine, the trial court had the authority, even before *Dueñas,* to "consider[]" the defendant's "[i]nability to pay" whenever it "increase[ed] the amount of the restitution fine" in excess of the $300 minimum. (§ 1202.4, subds. (b)(1), (c).) At the time of sentencing, appellant did not present any evidence regarding his inability to pay the $10,000 fine. Consequently, the issue has been forfeited on appeal. (*People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1154 [defendant "was . . . obligated to object to the amount of the [restitution] fine and demonstrate his inability to pay anything more than the $300 minimum"]; *People v. Johnson* (May 10, 2019, A149394) __ Cal.App.5th __ [2019 Cal.App. Lexis 426, *4, fn. 5].) *People v. Avila* (2009) 46 Cal.4th 680, 729 [defendant forfeited

issue by failing to object to imposition of restitution fine based on inability to pay].)

F. The Abstract of Judgment Must be Amended

Appellant contends, and the Attorney General concedes, that the abstract of judgment should be amended to accurately reflect both the sentence on the murder conviction (count 1) and appellant's actual credit for time served. The record confirms that appellant was sentenced to a term of 25 years to life on count 1, plus one consecutive year for the weapon enhancement. Nonetheless, the abstract of judgment states that the trial court imposed an indefinite term of "life with the possibility of parole" on count 1 and also an indefinite term of 25 years to life on the same count. The abstract should be amended to reflect the court's oral pronouncement of sentence. Specifically, the box for "life with the possibility of parole" should be unchecked, so the sentence on count 1 correctly reflects an indefinite term of 25 years to life, plus the one-year enhancement. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185 (*Mitchell*) [court has inherent power to correct errors and omissions appearing in abstracts of judgment].)

Although the abstract of judgment properly reflects that appellant was awarded 1,557 days of presentence custody credit, it incorrectly states that he was awarded 1,157 days of actual credit. The abstract should be amended to reflect that appellant was awarded 1,557 days of credit for time actually served. (*Mitchell*, *supra*, 26 Cal.4th at p. 185.)

DISPOSITION

The judgment is affirmed with the exception that the matter is remanded to the trial court for the preparation of an amended abstract of judgment that accurately states the

sentence imposed on count 1 and reflects appellant's award of 1,557 days of actual credit. The court shall forward a certified copy of the amended abstract to the California Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

YEGAN, Acting P. J.

TANGEMAN, J.

Gilbert A. Romero, Judge
Superior Court County of Ventura

Valerie G. Wass, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews, Scott A. Taryle and David E. Madeo, Deputy Attorneys General, for Plaintiff and Respondent.